No. SC85896

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel CHRIS K. RITZ,

Relator,

v.

MISSOURI COURT OF APPEALS, WESTERN DISTRICT,

Respondent.

On Petition for Writ of Mandamus

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This case involves an original petition for writ of prohibition or, in the alternative, writ of mandamus, filed in this Court by relator pursuant to Supreme Court Rules 94.01, et seq. and 97.01, et seq. The petition for remedial writ challenges the actions of respondent in relation to the appeal of the denial of relator's motion for post-conviction relief under Supreme Court Rule 29.15 by the Circuit Court of Clay County, the Honorable Larry D. Harman presiding. This Court issued a preliminary "alternative writ of mandamus" on April 20, 2004. Respondent filed its written return, and this Court appointed counsel for relator and activated the briefing schedule pursuant to Supreme Court Rule 84.24(i). As relator is challenging the action of the Court of Appeals and this Court has direct supervisory authority over that Court, this Court has jurisdiction to issue the requested original remedial writ. Article V, § 4, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Relator, Chris K. Ritz, was charged with three counts of first-degree statutory sodomy and one count of child molestation. State of Missouri v. Chris K. Ritz, WD58371, memo op. at 2 (Mo. App., W.D. March 6, 2001). This cause went to trial beginning in the Circuit Court of Clay County, the Honorable David W. Russell presiding. State of Missouri v. Chris K. Ritz, WD58371, order (Mo. App., W.D. March 6, 2001). At that time, relator was represented by retained trial counsel Ross Nigro (Rel.App. A213).

The facts of the underlying offense, as well as the result of the trial, were stated by the Western District Court of Appeals in its memorandum opinion on direct appeal as follows:

> [Relator] moved to Kansas City in July 1997. He rented a basement from Robin Cummins, who lived in a townhouse with her then six-year-old daughter, Mariah. After [Relator] moved out of Ms. Cummins' townhouse in October 1997, Mariah told several people, including her mother and social workers, that [relator] had shown her pornographic movies, touched and rubbed her vagina with his finger, licked her vagina with his tongue, and made her touch his penis with her hand.
>
> [Relator] was subsequently arrested and charged with three counts of first degree statutory sodomy. . . and one count of child molestation. . . . Counts I and II alleged that [relator] penetrated Mariah's vagina with his finger. Count III alleged that he touched

Mariah's genital area with his tongue or mouth. And Count IV alleged that [relator] caused Mariah to touch his genitals. At trial, Mariah testified that [relator] had shown her pornographic movies and had given her a "tickle spot" by licking his finger and putting it in her underwear. She also stated that he would put his finger in her vagina "almost every day." Mariah testified that [relator] made her touch his penis three times—once outside of his clothes, once outside of his underwear, and once inside of his underwear. Mariah also testified that [relator] once tried to lick her vagina but she would not let him. She stated that he instead licked her knee and told her that it would feel like that. Again, she refused to let him lick her vagina. Finally, Mariah testified that [relator] told her if she told anybody what he was doing to her, her mother would go to jail. At the close of the State's evidence, the court sustained [relator]'s motion for judgment of acquittal on Count II.

[Relator] testified on his own behalf and denied ever touching Mariah in an inappropriate manner. At the close of all of the evidence, [relator] moved for a judgment of acquittal on the three remaining counts. The court denied the motion but submitted Count III as attempted first degree statutory sodomy.

> The jury returned guilty verdicts on Counts I and III and a not guilty verdict on Count IV. [Relator] was sentenced to concurrent terms of fifteen and seven years imprisonment, respectively.

State of Missouri v. Chris K. Ritz, WD58371, memo op. at 2-3. On direct appeal, relator was represented by Public Defender Tara Jensen (Rel.App. A213). The Court of Appeals affirmed relator's conviction and sentence. State v. Ritz, 44 S.W.3d 865, 866 (Mo. App., W.D. 2001).

Subsequently, relator filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence, and retained counsel filed an amended motion raising nine claims of ineffective assistance of trial counsel, one claim of ineffective assistance of appellate counsel, and two claims of trial court error (Resp.App. A6-A33; Rel.App. 207-214). Prior to an evidentiary hearing, relator requested that new counsel be appointed, as his retained counsel had been appointed to the bench, and the Court appointed the Office of the State Public Defender to represent relator (Resp.App. A33). Assistant Public Defender John Schilmoeller filed his entry of appearance and represented relator at the evidentiary hearing on the amended motion (Resp.App. A34-A35; Rel.App. A15-A277). The motion court entered findings of fact and conclusions of law denying relator's motion (Rel.App. 278-283).

While awaiting the record on appeal for the post-conviction appeal, relator apparently requested that counsel submit to him "everything" counsel would complete with regard to the appeal for his approval prior to filing (Resp.App. A47, A52). Counsel stated that his schedule would not permit relator the opportunity to review counsel's work product prior to its filing, but assured relator that, based on his experience, he would raise the arguments supported by

the record and applicable law (Resp.App. A47). Counsel repeatedly told relator that he would welcome relator's suggestions and would refer to them in evaluating what claims to raise on appeal (Resp.App. A47-A50). Counsel sent several letters keeping relator informed as to the progress of the appeal, and encouraged relator to write back with any questions (Resp.App. A47-A51, A53-A54). On December 9, 2003, counsel filed "Appellant's Brief" with the Court, raising two claims on appeal, and sent a copy to relator (Resp.App. A78-A99). Upon learning that relator had not received that copy, counsel sent relator another copy, and advised relator that he was leaving the Public Defender's Office and that another attorney would be monitoring the remainder of the appeal (Resp.App. A65).

Sometime in January, 2004, relator attempted to file a *pro se* "Motion to Dismiss Appeallant [sic] Counsel and Leave to Amend Appeal with Leave to Perfect Appeal with Hired Legal Counsel/Motion for 180 day stay to re-file Appeal with legal points ignored" (Resp.App. A60-A61). That motion was returned to relator unfiled, as the Court's Special Rule XVI prohibited the filing of any pro se pleading by a represented party (Resp.App. A36). Relator persisted, sending respondent a letter in which he threatened to seek a writ of mandamus to compel filing of the motion (Resp.App. A62). Respondent gratuitously allowed the motion to be filed on February 2, and on February 10, denied relator's motion (Resp.App. A104). The next day, the State filed its brief in the post-conviction appeal, and on March 23, the Court placed the post-conviction appeal on its docket for submission on the briefs on April 21 (Resp.App. A104).

Meanwhile, on March 22, 2004, relator filed his application for a writ of prohibition,

or in the alternative, writ of mandamus in this Court regarding his motion for a stay and leave to hire counsel to file an amended brief (Resp.App. A37-A65). Suggestions in opposition were filed by respondent (Resp.App. A66-A99). On April 20, 2004, the day before the post-conviction case was to be submitted, this Court issued an "Alternative Writ of Mandamus" ordering respondent to allow the entry of appearance by new counsel and to set a new briefing schedule to give new counsel ninety days to file a substitute brief (Resp.App. A100, A104). Following respondent's written return, this Court ordered briefing on the writ application (Resp.App. A101-A104).

ARGUMENT

THE PRELIMINARY WRIT OF MANDAMUS DIRECTING RESPONDENT TO STAY RELATOR'S POST-CONVICTION APPEAL AND PERMIT THE ENTRY OF NEW COUNSEL AND FILING OF AN AMENDED BRIEF SHOULD BE QUASHED BECAUSE RELATOR WAS NOT ENTITLED TO A WRIT OF MANDAMUS IN THAT RESPONDENT HAD NO MANDATORY DUTY TO EITHER REVIEW OR GRANT RELATOR'S *PRO SE* MOTION WHEN HE WAS REPRESENTED BY COUNSEL, THERE IS NO CONSTITUTIONAL RIGHT TO REVIEW THE EFFECTIVENESS OF POST-CONVICTION APPELLATE COUNSEL, THUS RESPONDENT HAD NO DUTY TO REVIEW ANY CLAIM OF INEFFECTIVENESS, AND THE RECORD SHOWS THAT COUNSEL'S REPRESENTATION WAS REASONABLY PROFESSIONAL.

In his brief, relator claims that he received ineffective assistance of post-conviction counsel, not only on appeal, but also in the evidentiary hearing (as he argues for the first time before any court) (Rel.Br. 46). Relator argues that, "[o]n this record which appears before this Court. . . , there is no showing that : [counsel] was well prepared for the trial court 29.15 hearing; [counsel] conducted any research or investigation into the points that [counsel] did not present in his brief to the Western District; [counsel] had any basis for his conclusion that only 2 issues should be briefed to the Western District; further, there is no evidence that [counsel] ever sought to withdraw as counsel for [relator]" (Rel.Br. 28). Relator concedes that there is no constitutional right to "effective assistance" of counsel, but contends, without citing any legal principle requiring such action, that this Court should fashion a procedure to require

post-conviction appellate counsel to raise every claim on appeal that a post-conviction movant desires (Rel.Br. 35-48).

A. Relator's Writ Application and the Preliminary Writ

In his application for writ of prohibition or mandamus, relator argued that respondent "herein has not allowed Relator the right to present all facts on Appeal currently pending deposition [sic]" by denying his motion to dismiss post-conviction appellate counsel, for leave to "perfect" appeal with retained counsel, and for a 180-day stay to file a new brief (Resp.App. A38). Relator claimed that he was not represented effectively by counsel on appeal because he was not given "prefiling conferencing or review" of counsel's post-conviction appeal brief, which he claimed was "defective" in that it did not "present the most relavant [sic] claims that constitute ineffective assistance of trial counsel" (Resp.App. A39). Relator repeatedly referred to alleged constitutional or fundamental rights to due process and effective assistance of counsel, which he claims included "all statges [sic] of the post-conviction process including the 29.15 and the current appeal proceeding before the Missouri Court of Appeals" (Resp.App. A38, A42). In his suggestions in support, relator alleged that there was a "total breakdown of communications" between himself and counsel and alleged that counsel "acted unprofessionally" because "[o]ut of thirteen points of law [in his amended motion] only three are really address by this Assistant Public Defender" (Resp.App. A43-A44).

This Court granted relator's application for writ of mandamus, ordering respondent to allow substitute counsel to enter an appearance and give such counsel ninety days (instead of relator's requested 180 days) to file a substitute brief (Resp.App. 100). In its written return,

respondent admitted that it denied relator's motion, but denied that it had any mandatory duty to discharge relator's appointed counsel, allow the entry of appearance by new counsel, or set a new briefing schedule to permit a substitute brief, thus claiming that mandamus was not proper (Resp.App. 101-102).

B. Standard for Issuing Writ of Mandamus

Mandamus is a discretionary writ, and there is no right to have the writ issued. State ex rel. Missouri Growth Ass'n v. State Tax Com'n, 998 S.W.2d 786, 788 (Mo. banc 1999); State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446 (Mo. banc 1997); State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 576 (Mo. banc 1994). Mandamus will lie only when there is a clear, unequivocal, specific right to be enforced. Id. The purpose of the writ is to execute, not adjudicate. Id. Mandamus is only appropriate to require the performance of a ministerial act. Missouri Growth Ass'n, 998 S.W.2d at 788; State ex rel. Bunker Resource v. Dierker, 955 S.W.2d 931, 933 (Mo. banc 1997); Missouri Coalition v. Joint Comm. on Admin., 948 S.W.2d 125, 131 (Mo. banc 1997). Conversely, mandamus "cannot be used to control the judgment or discretion of a public official . . . ." Missouri Growth Ass'n, 998 S.W.2d at 788; State Bd. of Health Ctr. v. County Comm'n, 896 S.W.2d 627, 631 (Mo. banc 1995).

Respondent is aware of this Court's opinions in State v. Larson, 79 S.W.3d 891 (Mo. banc 2002), and State v. Saffaf, 81 S.W.3d 526 (Mo. banc 2002), both of which were handed down on the same day, stating that mandamus is available to 'correct an abuse of judicial discretion or to correct an abuse of extra-judicial power." Larson, 79 S.W.3d at 829; Saffaf, 81 S.W.3d 528 (Mo. banc 2002). Both of those cases, as well as relator in his brief, rely

exclusively on this Court's decision in State ex rel. Martin-Erb v. Missouri Com'n on Human Rights, 77 S.W.3d 600 (Mo. banc 2002), to support the assertion that mandamus generally may lie to review an allegation of abuse of judicial discretion (Rel.Br. 19). Id. However, a review of Martin-Erb shows that it made no such general declaration as to all applications for mandamus.

In deciding that mandamus was appropriate in Martin-Erb to deal with an alleged abuse of discretion by an administrative body, this Court relied first on § 536.150.1, RSMo 1994, which only applies to administrative proceedings and which expressly granted the right to seek mandamus to review any abuse of discretion by the administrative body which would otherwise be unreviewable. Martin-Erb, 77 S.W.3d at 605-06; § 536.150.1, RSMo 1994. As relator's petition does not deal with an administrative body and no such statute exists to govern his petition, this portion of Martin-Erb is inapplicable. Second, this Court relied on the 1940 Court of Appeals decision in Mangieracina v. Haney, 141 S.W.2d 89 (Mo.App. 1940), which stated that mandamus would lie "if it is apparent that such discretion has been abused or exercised in an arbitrary or unlawful manner." Id. at 607; Mangieracina, 141 S.W.2d at 92. However, both Martin-Erb and Mangieracina make it clear that this review of the alleged abuse of discretion deals only with whether the respective administrative bodies followed or disregarded its rules and regulations in making its decision, not with the discretion regarding the ultimate decision to be made itself. Martin-Erb, 77 S.W.3d at 607-08; Mangieracina, 141 S.W.2d at 92. "[W]here such discretion has been arbitrarily or capriciously exercised, the remedy is not for the court to substitute its discretion for that of the licensing authority, but

it should compel the exercise of the discretion by the party who is vested with it 'so as to conform to lawful and just methods of procedure.'" Mangieracina, 141 S.W.2d at 92. The import of these holdings is not that mandamus will lie to review any discretionary act, but that mandamus is available to review an "abuse of discretion" in refusing to do that which the law requires. Martin-Erb, 77 S.W.3d at 607-08; Mangieracina, 141 S.W.2d at 92. Therefore, Martin-Erb (and thus its progeny, including Larson and Saffaf) does not permit mandamus for a higher court to "substitute its discretion" for that of the lower court, but only to ensure that the lower court followed the law in reviewing relator's motion. As such, the preliminary writ of mandamus should only be made permanent if respondent had a non-discretionary duty to grant relator's motion to dismiss appointed counsel, allow him to hire new counsel, and set a new briefing schedule.

C. Respondent Acted Within Its Discretion in Denying Relator's Request

1. Nothing Required Respondent to Consider Relator's Pro Se Motion to Stay or to File a Substitute Brief

At the outset, it should be noted that respondent had no duty to even consider all of relator's motion in the first place. No statute or Supreme Court Rule governs the propriety of permitting any party represented by counsel, let alone a post-conviction movant/appellant, to file a *pro se* motion petitioning a court to stay proceedings to permit new counsel to enter an appearance and to file a new brief. See State v. Hurt, 931 S.W.2d 213, 214 (Mo. App., W.D. 1996)(no duty for court to consider *pro se* motions when defendant represented by counsel). Respondent has in place the following court rule to govern *pro se* filings by represented parties:

> In any case where a party is represented by counsel, the Clerk ***shall not accept for filing any pro se briefs, pleadings, or other papers***. In the event that such briefs, pleadings, or papers are presented for filing, the Clerk shall acknowledge receipt and notify the party that such papers are not being filed. The Clerk shall also notify the responsible attorney of the receipt of the papers, including with the notification, copies of such papers. The court ***will accept for filing pro se motions in proper form***

addressing the removal of counsel.[1],[2]

Missouri Court of Appeals, Western District Special Court Rule XVI(A) (emphasis added).

Here, relator's requests for leave to file an amended brief and for a stay of 180 days, while peripherally related to his claim regarding his desire to dismiss counsel, did not address the removal of counsel, but were other requests. No law requires that courts accept and review any

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[1]The Eastern and Southern Districts of the Court of Appeals have similar rules. Missouri Court of Appeals, Eastern District Local Court Rule 380; Missouri Court of Appeals, Southern District Special Court Rule 6.

[2]Respondent acknowledges that this Court has held that a court has a responsibility to consider matters dealing with a dispute between counsel and a criminal defendant, and that the defendant's lack of legal training is immaterial. State v. Owsley, 959 S.W.2d 789, 793 (Mo. banc 1997), cert. denied 525 U.S. 882 (1998). It should be noted that the language in Owsley is supported by a reference to United States v. Blum, 65 F.3d 1436 (8th Cir. 1995). Id. A review of Blum shows that the court's responsibility to review such a dispute is only triggered by a "seemingly substantial complaint" about counsel. Blum, 65 F.3d at 1440. Regardless, this obligation should not ***require*** a court to accept *pro se* filings by a represented party on this issue (thus, permitting communications with a represented party), as better practice would be to require attorneys to bring such complaints to the court's attention. Further, that responsibility definitely would not require a court to accept *pro se* court filings by a represented party requesting any other relief other than addressing problems with counsel.

claim that a represented party wishes to file in *pro se* manner, and for a Court to communicate with a represented party may very well constitute a violation of ethical rules. See Supreme Court Rule 2.03, Canon 3(B)(7); Supreme Court Rule 4.4-2. Therefore, respondent had no duty to even consider relator's requests for a stay and leave to file another brief.

If relator wanted to terminate counsel and make the requests for a stay and leave to file a new brief, had at least two options: first, he could have indicated his desire to represent himself, i.e. "enter his appearance," in the appeal. At least one appellate court has recognized that a post-conviction movant has the right to represent himself in a post-conviction proceeding, as the rules governing post-conviction relief do not prohibit self-representation, and the concept of "[c]ompulsory acceptance of appointed counsel" in lieu of self-representation would constitute a "radical departure from routine civil and criminal practice." Bittick v. State, 105 S.W.3d 498, 504 (Mo. App., W.D. 2003). Therefore, had respondent believed relator's motion to dismiss counsel was well-taken, the court could have then considered relator's other *pro se* requests, as relator would no longer be represented by counsel, but would be representing himself. However, a review of relator's motion shows that he made no request to represent himself (Resp.App. A60-A61).

Second, relator could have hired counsel to enter his or her appearance on relator's behalf, who then could have requested the extraordinary relief relator sought. While relator's motion expressed a desire to hire counsel, there is no indication that he had actually retained counsel to take over his representation. In essence, because relator did not move to represent himself or actually retain counsel, all that relator has done is make a *pro se* motion for

continuance, which respondent definitely had not duty to consider. Hurt, 931 S.W.2d at 214. That relator chose to neither represent himself nor hire counsel should not create a duty on behalf of respondent to consider claims not properly brought before it.

That respondent had no duty to allow a represented party to file *pro se* motions is clear from the fact that no legal directive requires it, which is not surprising, as even a criminal defendant has no right to "hybrid" representation—that is, to take some actions on his own behalf while counsel maintains responsibility for other actions. State v. Hampton, 959 S.W.2d 444, 447 (Mo. banc 1997). To impose such a duty upon courts is to create far more problems than it would cure. For example, if a defendant has the power to file motions on his own behalf without the involvement of counsel, would the State have the ability to communicate with the defendant about those motions, which it should, as he is acting as his own counsel at that point? This conclusion would seem to conflict with law stating that the State's communication with a "represented" defendant is "extremely suspect," although the question would remain whether the defendant was truly "represented" as to issues he raises *pro se*. State v. Chandler, 605 S.W.2d 100, 110-114 (Mo.banc 1980). Further, if a represented defendant raises certain claims in a *pro se* motion, would he be deemed to have waived rights regarding those allegations, e.g. the right to be free from self-incrimination? Could counsel be found ineffective for his or her performance when a represented defendant's *pro se* activities may have interfered with counsel's trial strategy (if counsel would still even be permitted to rely on his own trial strategy)? Would the appellate court be required to accept two briefs if counsel and appellant decided to raise different issues? If an appellate court grants oral

argument in a case where a represented party also submitted *pro se* arguments, is it required to grant a *pro se* appellant a chance to be heard on his claims? In all of these situations, who would a court or prosecutor be obligated to serve filings and notices on, counsel, the defendant, or both? Such problems would be pervasive in trial and appellate courts if represented litigants are permitted, in effect, to act as independent co-counsel by requiring courts to review any *pro se* request filed by represented parties. On the other hand, these problems are easily prevented by recognizing that trial and appellate court do not have a duty to accept *pro se* filings by litigants who are represented by counsel.

Further, to impose a duty to consider relator's motion for stay and to file a substitute brief in this case presents other logistical problems and prevents respondent from fulfilling its important judicial goals of maintaining control over its docket and resolving cases in a timely manner. As no substitute counsel has entered his appearance in the case (and nothing indicates that relator has retained counsel to do so), if relator is unable to hire counsel within the 90 days the preliminary writ granted for the purpose of filing a brief, it is unclear as to what respondent must do next. Is respondent bound to grant relator more time to hire new counsel, or may it decide the case on the briefs already filed (even though counsel has been "discharged"), or may it dismiss relator's appeal for failure to file the substitute brief? To require respondent to put this case on hold indefinitely violates this Court's principle that timely resolution of post-conviction proceedings (which would seemingly include appeal) serves the legitimate end of avoiding delay in prisoner's claims and preventing the litigation of stale claims. State v. Day, 770 S.W.2d 692, 695 (Mo. banc), cert. denied 493 U.S. 866

(1989). The fact that the preliminary writ cannot answer the above questions demonstrates that the actions requested by relator did not impose any duty on respondent to consider those requests.

Further, such action removes from respondent its discretion to rule on matters affecting the control of its docket. A court "must have the necessary authority to control and move" its docket. State v. Honeycutt, 96 S.W.3d 85, 89 (Mo. banc 2003). That respondent has taken its responsibility to control its docket and resolve cases in a timely manner can be seen from its promulgation of local rules and other orders to address both the time for and manner in which parties to seek extensions of time to fulfill various duties. See Missouri Court of Appeals, Western District Special Court Rules XV, XVII; Guideline of the Court re: Extensions of Time in Direct Criminal and Post-Conviction Appeals, (Mo.App., W.D. April 1996) (Resp.App. A105). To allow relator to stop and start respondent's review of his case, after briefing has been completed and without any legal authority to require respondent to permit such delay, essentially puts control of the docket in relator's hands. Such a result is unsupported by law, as "it is [the court], not [the parties], who must control the court's docket." State ex rel. Picerno v. Mauer, 920 S.W.2d 904, 914 (Mo.App., W.D. 1996)(Stith, J., dissenting). Therefore, because relator's requests, made in an improper manner, would violate respondent's authority to control its docket and dispose of cases in a timely manner, it is clear that there was no legal duty on respondent to consider relator's *pro se* requests for leave to file an amended brief and for a stay to give him time to do so.

2. No Mandatory Duty to Grant Relator's Request to Dismiss Counsel

Regardless of whether respondent had a duty to even consider relator's claims in his motion, the record shows that it did so (Resp.App. 104). As respondent reviewed all of relator's claims, this makes the relevant question whether or not respondent had a duty to grant respondent's motion to dismiss counsel, to file an amended brief, and for a stay.[3] A court's ruling on a motion to dismiss counsel is "a legitimate exercise of its discretion and will not be disturbed on appeal unless there is a clear abuse of discretion" and the appellate court will "indulge every intendment" in favor of the lower court's ruling. State v. Owsley, 959 S.W.2d 789, 792 (Mo. banc 1997), cert. denied 525 U.S. 882 (1998); see also State v. Hornbuckle, 769 S.W.2d 89, 96 (Mo. banc), cert. denied 493 U.S. 860 (1989); Vogel v. State, 31 S.W.3d 130, 146-147 (Mo. App., W.D. 2000); State v. Anthony, 837 S.W.2d 941, 944 (Mo. App., E.D. 1992). Because the decision whether or not to grant relator's motion was a discretionary act, mandamus is not available to review or interfere with that exercise of discretion, as there is no clear, unequivocal, specific right for relator to dismiss appointed counsel to be enforced,[4] and making the preliminary writ permanent would be adjudicating the merits of respondent's discretionary decision, not forcing the execution of a required act. Missouri Growth Ass'n,

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[3]From this point on, respondent will refer to this motion as relator's motion to dismiss counsel for the sake of brevity, as the appellate court's denial of that portion of the motion made the other requested relief moot.

[4]There is no allegation of a conflict of interest or impairment of counsel. A post-conviction movant has a right to conflict-free counsel. See State v. Griddine, 75 S.W.3d 741 (Mo. App., W.D. 2002); see also Supreme Court Rule 4-1.16.

998 S.W.2d at 788; Griffin, 945 S.W.2d at 446; Mummert, 887 S.W.2d at 576. Therefore, this Court should quash its preliminary writ of mandamus.

Even if the rule were otherwise and this Court was to review respondent's exercise of its sound discretion in denying relator's motion to dismiss counsel, it would find that respondent's ruling did not result in a clear abuse of discretion. In the criminal law context, to warrant substitution of counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel. Hornbuckle, 769 S.W.2d at 96; State v. Gilmore, 697 S.W.2d 172, 174 (Mo. banc 1985), cert. denied 476 U.S. 1178 (Mo. banc 1985). Such justifiable dissatisfaction arises when there is an irreconcilable conflict[5] with appointed counsel. Owsley, 959 S.W.2d at 792; Hornbuckle, 769 S.W.2d at 96; Vogel, 31 S.W.3d at 147. To prevail on a claim of irreconcilable differences, the defendant must produce objective evidence of a "total breakdown in communication." Owsley, 959 S.W.2d at 792; State v. Parker, 886 S.W.2d 908, 929 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995); Hornbuckle, 769 S.W.2d at 96; Vogel, 31 S.W.3d at 147.

In this case, there was not a total breakdown in communication between relator and post-conviction counsel. The record shows that, even though counsel could no longer speak with relator by phone due to Public Defender budget cuts, that the two maintained communication by mail (Resp.App. A47-A51, A53-A54, A65). A review of counsel's letters shows that he responded to statements made by relator in his letters, that he considered

[5]"Conflict" is used in its general meaning, not to refer to a conflict of interest.

relator's recommendations as to what to include in the brief, and that he kept relator apprized of the progress of the appeal (Resp.App. A47-A51, A53-A54, A65). Because there was in fact still ongoing communication between relator and counsel throughout the preparation of the brief, this by definition shows that there was not a total breakdown in communication. Owsley, 959 S.W.2d at 793; Vogel, 31 S.W.3d at 147. A total breakdown is not established by showing that relator merely disagreed with counsel as to strategy in deciding what claims to present in the brief. Vogel, 31 S.W.3d at 147; State v. Harris, 669 S.W.2d 579, 582 (Mo. App., E.D. 1984); State v. Denny, 619 S.W.2d 931, 933 (Mo.App., S.D. 1981).

Further, that counsel did not allow relator to decide on the points on appeal or pre-approve the arguments counsel chose to raise does not establish a total breakdown in communication. Relator had no right to act as co-counsel, and the decision as to what issues to pursue on appeal belonged to counsel, not relator. State v. Williams, 34 S.W.3d 440, 442 (Mo.App., S.D. 2001); see Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(no constitutional right to force counsel to raise claims on appeal); see Supreme Court Rule 4-3.1. Because there was not objective evidence showing a total breakdown in communications between relator and counsel, respondent did not clearly abuse its discretion in denying relator's motion to dismiss counsel. Therefore, the preliminary writ of mandamus granting relator's motion should be quashed.

D. There is No Viable Claim of Ineffective Assistance of Post-Conviction Counsel

1. No Constitutional Right to "Effective Assistance" of Post-Conviction Counsel or to Force Appellate Counsel to Raise All Non-frivolous Potential Claims

Relator begins his argument acknowledging that neither federal nor Missouri law reveals any right for a post-conviction movant to receive review of the effectiveness of post-conviction counsel (Rel.Br. 19-20). This is true—as the United States Supreme Court and this Court have repeatedly recognized, there is no federal or state constitutional right to the effective assistance of post-conviction counsel, as there is no constitutional right—Sixth Amendment, Eighth Amendment, due process, equal protection, or otherwise—to counsel in such a proceeding. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Murray v. Gueridon, 492 U.S. 1, 7-10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); Winfield v. State, 93 S.W.3d 732, 738 (Mo. banc 2002); State v. Chambers, 891 S.W.2d 93, 113 (Mo. banc 1994); State v. Hunter, 840 S.W.2d 850, 871 (Mo. banc 1992), cert. denied 509 U.S. 926 (1993). This is because a post-conviction relief proceeding, a collateral attack on the conviction, is not a part of the criminal proceeding itself and is considered civil in nature. Finley, 481 U.S. at 556-57. As such, this Court has repeatedly held that claims of ineffective assistance of post-conviction counsel are not reviewable nor cognizable on appeal. Winfield, 93 S.W.3d at 738; Parker, 886 S.W.2d. at 933; State v. Shurn, 866 S.W.2d 447, 472 (Mo. banc 1993), cert. denied, 513 U.S. 837 (1994); Hunter, 840 S.W.2d at 871; Pollard v. State, 807 S.W.2d 498, 502 (Mo. banc 1991), cert. denied 502 U.S. 943 (1991).

Relator attempts to equate this case to the line of abandonment cases, citing Luster v. State, 785 S.W.2d 103 (Mo. App., W.D. 1990), in support of his argument that the effectiveness of post-conviction counsel should be reviewed (Rel.Br. 20-21). However,

review for abandonment, as developed by this Court in Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991), and Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991), is appropriate only where there has been either no action at all by post-conviction counsel (Luleff) or when appointed counsel fails to timely file an amended motion (Sanders). State v. White, 873 S.W.2d 590, 598 (Mo. banc 1994). "Absent total abandonment, such as failure to properly file an amended motion as required by Rule 29.15(e), defendant has no right to effective assistance of post-conviction counsel." Id. Because counsel did not abandon relator, as he properly filed relator's relief raising what he believed to be meritorious claims, relator's reliance on an abandonment theory must fail.

Relator also argues that counsel had a duty to raise all of the claims contained in the amended motion because the claims were not frivolous (Rel.Br. 33-34). In support of creating a system in which post-conviction appellate counsels should either brief all potential non-frivolous issues, relator relies on an unpublished opinion of the Missouri Court of Appeals[6] or procedures adopted by California and Arizona, each of which involve the concept of an Anders brief as described in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (Rel.Br. 35-45). However, Anders is inapplicable. First, it deals with first appeals

[6]That opinion, Martin v. State, 2000 WL 342133 (Mo.App., W.D. 2000), was vacated when this Court accepted transfer and affirmed the case pursuant to Rule 84.16(b). Martin v. State, 34 S.W.3d 826 (Mo. banc 2001). As the Western District's opinion in Martin was vacated, it cannot be relied upon as authority.

from criminal convictions as a matter of right, not to collateral attacks on a criminal conviction. Id. at 741-43. Second, Anders applies to a situation where counsel believes there are no meritorious claims for appeal, not where counsel raises meritorious issues while choosing not to raise other non-frivolous issues. Id. The United States Supreme Court has made it clear that Anders does not apply to which issues or how many issues appellate counsel is required to raise on appeal. In Jones v. Barnes, 463 U.S. 745 (1983), the Court clarified that Anders did not grant an indigent defendant a constitutional right to compel appointed counsel to press even non-frivolous issues on appeal if counsel, in his or her professional judgment, decided not to raise the issues. Id. at 751.

Missouri has adopted the reasoning of Jones v. Barnes, holding that appellate counsel, even on direct appeal, does not have a duty to raise every potential non-frivolous claim on appeal that could possibly be raised. Mallet v. State, 769 S.W.2d 77, 83-84 (Mo. banc 1989), cert. denied 494 U.S. 1009 (1990); Parham v. State, 77 S.W.3d 104, 107 (Mo.App., S.D. 2002). If appellate counsel on direct appeal does not have an obligation to raise every potential claim on appeal, certainly post-conviction appellate counsel also must have no such obligation.

The issue in this case is not why there should be review of the effectiveness of post-conviction representation—that issue appropriately belongs to the legislature or to this Court in its rulemaking authority. The issue is whether mandamus should issue against respondent for following the precedents of this Court and the United States Supreme Court in refusing to review counsel's representation for potential ineffectiveness. Because Missouri does not

recognize a claim of ineffective assistance of post-conviction counsel, respondent could not have breached any duty to consider such a claim in relator's motion to dismiss counsel. Therefore, the preliminary writ should be quashed.

2. Post-Conviction Counsel's Representation was Reasonably Professional

Even though he recognizes that he has no constitutional right to raise a claim of ineffective assistance of post-conviction counsel, relator persists in claiming that counsel's representation in the post-conviction proceedings was deficient (Rel.Br. 19-20, 24-28). To assure this Court that there is no merit to these claims and that counsel performed not only competently, but admirably, respondent will gratuitously address relator's arguments regarding the quality of counsel's representation.

Relator argues that his claims have merit because "there is no showing" on the record before this Court that counsel was well-prepared for the evidentiary hearing or conducted adequate research into or formed a basis for deciding to raise only two issues in the post-conviction appeal (Rel.Br. 28). Even if he could receive review of his claim, which he cannot, relator completely disregards the standard for the review of claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, it is the movant's "heavy" burden to demonstrate by a preponderance of the evidence that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced, i.e. that there was a reasonable likelihood that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Ringo v. State, 120 S.W.3d 743, 747 (Mo. banc

2003); Nicklasson v. State, 105 S.W.3d 482, 483 (Mo. banc 2003); Lyons v. State, 39 S.W.3d 32, 36 (Mo. banc), cert. denied 122 S.Ct. 402 (2001); Bucklew v. State, 38 S.W.3d 395, 397 (Mo. banc), cert. denied 122 S.Ct. 374 (2001); Supreme Court Rule 24.035(i),(k); Supreme Court Rule 29.15 (i),(k). Further, there is a strong presumption that counsel's action falls within the wide range of reasonable professional assistance and that his decisions are matters of trial or appellate strategy. Strickland, 466 U.S. at 689-690; Taylor v. State, 126 S.W.3d 755, 759 (Mo. banc 2004); Ringo, 120 S.W.3d at 747. Therefore, the alleged failure of the record to show whether or not counsel's actions were reasonably competent works to relator's detriment, not his favor.[7]

Further, a review of the amended motion, which counsel was stuck with as it was filed by prior retained counsel, the evidentiary hearing, and the appellate brief shows that counsel's decisions to only raise two claims was not only competent, but reasonable. Counsel, being an experienced post-conviction and appellate attorney, would have at first glance noticed the glaring insufficiencies of the amended motion. A motion court is not required to hold an

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[7]Relator attempts to supplement the record in his appendix with his own self-serving affidavit in which he makes numerous unsubstantiated claims as to counsel's performance at and after the evidentiary hearing (Rel.App. A326-A329). As this affidavit contains information not properly presented to the court below, it is a matter outside of the record, and may not be considered on appeal. See State v. Strong, SC85419, slip op. at 43 (Mo. banc August 24, 2004). Respondent will be filing a motion to strike the offending portion of the appendix.

evidentiary hearing on a claim of post-conviction relief unless the movant pleads facts, not conclusions, demonstrating that he was entitled to relief, that the record does not refute his claim, and that he was prejudiced by trial counsel's actions. Dorsey v. State, 115 S.W.3d 842, 844-45 (Mo. banc 2003); Wilkes v. State, 82 S.W.3d 925, 928 (Mo. banc 2002). As distinguished from other civil pleadings, movant's amended motion must plead every fact necessary for relief, as courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer from relief. Morrow v. State, 21 S.W.3d 819, 822-24 (Mo. banc 2000).

The allegations of relator's amended motion were, at the very least, bare allegations or conclusions, and failed to rise to the level of pleading necessary to merit consideration in an evidentiary hearing. For example, to succeed on a claim of counsel's failure to call a witness, the motion must allege: (1) the identity of the witness; (2) what the witness' testimony would have been; (3) that counsel was informed of the witness' existence; (4) whether the witness was available to testify; and (5) that the testimony would have provided the movant with a viable defense. Wilkes, 82 S.W.3d at 928. In relator's fifth claim, he alleged that trial counsel was ineffective for failing to call his mother to testify, but failed to allege that she was available to testify, that counsel was informed that she possessed this information, or that such testimony would have presented a viable defense, thus failing to plead sufficient facts to even warrant a hearing (Rel.App. A208, 211). Likewise, in his third claim, he alleged that counsel "failed to explore the possibility and present expert witnesses" regarding interrogation techniques, but did not identify any such expert, allege what that expert testimony would have

been or if such an expert would have been available to testify, or that any such testimony would have provided a viable defense (Resp.App. A208, A210-A211). His claim of ineffective assistance of appellate counsel was even more lacking, as all he alleged was that appellate counsel "failed to adequately argue that there was insufficient evidence to support the conviction," without making any allegation of how the argument was inadequate (Resp.App. A209). That post-conviction counsel was able to obtain an evidentiary hearing on this inadequately pled amended motion testifies not only to his competence, but his considerable skill in litigating post-conviction matters. Further, at the evidentiary hearing, counsel was able to elicit evidence to support most of the inadequately-pled claims, further demonstrating the competency of his representation (Rel.App. A219-233, A248-A263, A269-A270).

As explained in the previous subsection, appellate counsel is free to winnow out even non-frivolous claims on appeal. Post-conviction counsel chose to raise two claims from relator's motion on appeal, the first claim, regarding the failure to call Shelly Thompson, and the ninth claim, regarding the failure to object to testimony of the victim's prior statements which were contradicted by her trial testimony (Resp.App. A78-A99). Even a cursory review of the claims counsel chose not to raise on appeal shows that counsel's decisions were reasonably strategic, as they would have been meritless before the Court of Appeals.

Relator's second and seventh post-conviction claims, dealing with trial counsel's failure to object to leading questions and "uh-huh" answers during the child victim's testimony, would have failed as counsel testified his decision not to object was strategic, as 1) he believed the victim's answers were "very clear" at trial, and 2) he did not want the jury to think he was

"bullying" the victim (Rel.App. A237, A240-A241, A248). This Court has noted that the decision not to object to certain questions that counsel believes will irritate the jury and do more harm than good is reasonable trial strategy. Barnett v. State, 103 S.W.3d 765, 772 (Mo. banc), cert. denied 124 S.Ct. 172 (2003); State v. Clay, 975 S.W.2d 121, 135 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). Therefore, these two claims would not have succeeded on appeal.

In addition to being inadequately pled, Relator's third claim, that trial counsel was ineffective for failing to "explore the possibility" and present expert witnesses regarding the "interrogation" techniques used by official interviewers of the victim, would have failed as counsel testified that his trial strategy was that the allegations were falsely manufactured by the victim's mother and her friend, not by the interviewers (A238). The decision not to call an expert witness is a matter of trial strategy, and the decision to select one reasonable theory of defense instead of another is not ineffective assistance of counsel. State v. Kinder, 942 S.W.2d 313, 336 (Mo. banc 1996), cert. denied 522 U.S. 854 (1997); State v. Butts, 938 S.W.2d 924, 931 (Mo.App., S.D. 1997). Therefore, this claim would not have succeeded on appeal.

Relator's fourth post-conviction claim, that trial counsel failed to elicit testimony that the victim and her mother did not want to prosecute relator or testify, would have failed, as such evidence would have been inadmissible, as it is irrelevant to the determination of guilt or innocence. State v. White, 733 S.W.2d 57, 59 (Mo. App., E.D. 1987). Counsel is not ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.3d 726, 741

(Mo. banc 2003). Further, the motion court believed counsel had no knowledge of this alleged desire not to prosecute, as he testified that, based on his observations, "they wanted to prosecute pretty bad" and the victim's mother wanted relator to "go to prison for life" (Rel.App. A232). That credibility finding was unchallengeable on appeal, as the appellate court defers to the motion court's credibility determinations. Williams v. State, 111 S.W.3d 556, 563 (Mo. App., W.D. 2003). Thus, this claim would not have succeeded on appeal.

Relator's fifth claim, that trial counsel failed to call relator's mother to testify regarding a phone call in which the victim's mother allegedly demanded money in exchange for not prosecuting relator, would also have failed on appeal. The motion court believed trial counsel's testimony that he was never told about this phone call by relator. Counsel is not ineffective for failing to call a witness that his client fails to tell him about. State v. Twenter, 818 S.W.2d 628, 639 (Mo. banc 1991); Crooks v. State, 131 S.W.3d 407, 410-11 (Mo.App., S.D. 2004).

Relator's sixth claim, that trial counsel failed to elicit testimony from relator and other witnesses that relator's VCR was not in the basement, as the victim claimed, would have failed because defense witnesses Gina Isom and Stacey Beeler testified that they never saw a VCR in the basement, and relator testified that he never had a VCR or pornographic movies in the basement (Rel.App. A64, A66, A72). Any further evidence on this point would have been cumulative, and counsel is not ineffective for failing to present cumulative evidence. Christeson v. State, 131 S.W.3d 796, 799 (Mo. banc 2004). Therefore, this claim would not have succeeded on appeal.

Relator's eighth claim, that counsel failed to file a request for a speedy trial, would also have failed. First, relator failed to plead that he requested that counsel assert his speedy trial rights (Resp.App. A209). Second, trial counsel testified that, as a matter of trial strategy, he did not seek a speedy trial because the case was so complicated that he could not have been ready for trial any sooner than the actual trial date (Rel.App. A244-A246). Third, relator could not have established Strickland prejudice, as there is nothing in the record showing that relator would have been tried sooner had he requested a speedy trial, or that there was any likelihood, let alone a reasonable one, that the outcome of the trial would have been different. See Myzka v. State, 16 S.W.3d 652, 658 (Mo. App., W.D. 2000). Therefore, any appeal of this issue would have failed.

Relator's inadequate claim that appellate counsel was ineffective for failing to "adequately argue" the sufficiency of the evidence was also meritless. Appellate counsel raised the issue of insufficiency of the evidence on direct appeal. State v. Ritz, memo op. at 3. The Court of Appeals reviewed the claim as preserved error and found that the evidence was sufficient. Id. at 3-4. This Court has stated that ineffective assistance of appellate counsel deals with the failure to ***raise*** a claim that should have been raised. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). This appears to preclude claims regarding issues that appellate counsel did raise and for which appellate review was granted. Therefore, this claim would not have succeeded on appeal.

Relator's final two claims, the denial of his speedy trial rights and trial court error in permitting the "amendment" of one count of statutory sodomy to attempt, were also meritless,

as they alleged trial court error. Allegations of trial court error are not cognizable under Rule 29.15. State v. Ferguson, 20 S.W.3d 485, 509 (Mo. banc), cert. denied 531 U.S. 1019 (2000). Therefore, these claims could not have even been reviewed on appeal, much less succeeded.

Not only does the above analysis show that counsel's decision not to raise these claims on appeal were reasonable, but also demonstrates that, even if a claim of ineffective assistance of post-conviction appellate counsel existed, relator would not be entitled to relief on such a claim, as a claim of ineffective assistance of appellate counsel requires a showing that the claims not raised would have required reversal if raised. Hall, 16 S.W.3d at 587. Here, because none of the issues relator contends should have been raised in his appellate brief would require reversal on appeal, post-conviction appellate counsel could not have been ineffective in any respect.

Because respondent had no mandatory duty to either review or grant relator's *pro se* motion, because there is no constitutional right to review for the effectiveness of post-conviction appellate counsel, and because nothing in the record demonstrates that counsel has failed to perform competently, mandamus does not lie against respondent for denying relator's motion to dismiss counsel. Therefore, this Court should quash the preliminary writ issued in this case.

CONCLUSION

In view of the foregoing, respondent submits that this Court should quash its preliminary writ of mandamus ordering respondent to grant relator a stay of 90 days for relator to hire new counsel to prepare a substitute brief in relator's post-conviction appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 9,475 words, excluding the cover and this certification, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24th day of September, 2004, to:

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